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In the Supreme Court of the United States

OCTOBER TERM, 1974

EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL., PETITIONERS

v.

WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. D 33a-57a) is reported at 370 F. Supp. 325. The opinion of the court of appeals (Pet. App. C 7a-32a) is reported at 506 F.2d 1278.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1974. On December 6, 1974, the court denied Eastern Kentucky's petition for rehearing and also denied its suggestion for rehearing *en banc* (Pet. App. A 1a-5a; App. B 6a). The petition for a writ of certiorari was filed on March 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a revenue ruling issued by the Secretary of the Treasury providing that a hospital is entitled to exemption from taxes if it furnishes emergency care for all patients regardless of their ability to pay correctly interprets Section 501(c)(3) of the Internal Revenue Code of 1954, which accords tax-exempt status to organizations organized and operated exclusively for "charitable" purposes.

2. Whether the Secretary's promulgation of the revenue ruling was exempt from the notice and hearing requirements of the Administrative Procedure Act because the ruling was an "interpretative rule."

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Internal Revenue Code and the Treasury Regulations are set forth in Appendix G of the petition.

STATEMENT

This class action was brought by several individuals and a number of national and regional nonprofit health and welfare organizations on behalf of all indigent persons who are unable to pay for the costs of hospital care. The complaint alleged that the Secretary of the Treasury and the Commissioner of Internal Revenue erroneously recognized as tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, private nonprofit hospitals that do not render free or below-cost medical service to indigents. Petitioners sought broad declaratory and injunctive relief which would require the Treasury to deny such hospitals tax-exempt status under Section 501(c)(3) of the Internal Revenue

Code of 1954 and bar deductibility of contributions to them under Section 170(c)(2) (J.A. 25-28).[1]

The circumstances which gave rise to this action concern the promulgation of two revenue rulings setting forth the Internal Revenue Service's position with regard to the exempt status of nonprofit hospitals.[2] The first of the two rulings, Revenue Ruling 56-185, 1956-1 Cum. Bull. 202, enumerated four general requirements which a hospital was required to satisfy to establish that it was exempt as a public charitable organization within the contemplation of Section 501(c)(3). One of the requirements included the condition that, to the extent of its financial ability, the hospital serve those not able to pay for the services rendered.

The Commissioner issued a second revenue ruling in 1969 modifying the earlier ruling. The later ruling, Revenue Ruling 69-545, 1969-2 Cum. Bull. 117, provided that a nonprofit hospital would also qualify for tax-exempt status if it operated a full-time emergency room which was open to all patients, regardless of their ability to pay, and if it accepted all patients who could pay the costs of their regular hospital care either directly or through some form of third-party reimbursement program, such as private health insurance, Medicare or Medicaid. Revenue Ruling 69-545 further stated that such a hospital would be recognized as tax-exempt even though non-emergency patients who could not meet the financial requirements for admission were ordinarily referred to another hospital in the community that did serve indigent patients.

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[1] "J.A." refers to the joint appendix filed in the court of appeals.

[2] Such rulings are published communications of the Commissioner of Internal Revenue to field offices, taxpayers, taxpayers' representatives, trade associations and others. The stated purpose of the revenue rulings system is to inform subordinate revenue officials of established policies and to make such information available to the public. Rev. Rul. 2, 1953-1 Cum. Bull. 484; Rev. Rul. 212, 1953-2 Cum. Bull. 449. See also *Dixon* v. *United States*, 381 U.S. 68, 73.

In this action, petitioners alleged that Revenue Ruling 69-545 was an erroneous interpretation of Section 501(c)(3) and that the Commissioner's issuance of the ruling had resulted in their inability to receive medical care from tax-exempt hospitals. They further alleged that the ruling was void since it had not been issued in accordance with the rule-making provisions of the Administrative Procedure Act requiring a public hearing and an opportunity for interested and affected persons to be heard. Petitioners sought a judicial declaration that the Treasury officials had acted unlawfully in recognizing the tax-exempt status of private nonprofit hospitals that did not admit indigents and provide free or below-cost medical care to them. Petitioners also sought an injunction requiring the Commissioner of Internal Revenue to revoke the exempt status of hospitals that did not furnish free care and to prohibit the future recognition of such hospitals as exempt organizations under Section 501(c)(3) (J.A. 25-28).

The Treasury officials moved to dismiss the complaint on the ground that the court lacked jurisdiction. The district court denied the motion to dismiss without opinion (J.A. 32). Subsequently, upon the parties' cross motions for summary judgment, the district court granted summary judgment for petitioners. It held that the court had jurisdiction to determine whether Revenue Ruling 69-545 was erroneous and that petitioners had standing to maintain the action. The court further held that the revenue ruling at issue was invalid. In view of that holding, the court did not reach the issue whether the ruling was void because it was not issued in accordance with the notice and hearing provisions of the Administrative Procedure Act (Pet. App. D 33a-57a). The district court entered a declaratory judgment and an injunction along the lines sought by petitioners.

The court of appeals reversed. It held that Revenue Ruling 69-545 was not inconsistent with the legislative intent of Section 501(c)(3) and that the modification of the prior revenue ruling was proper. That court also concluded that the revenue ruling was interpretative, and thus not subject to the notice and hearing provisions of the Administrative Procedure Act, and that promulgation of the ruling did not constitute an abuse of discretion (Pet. App. C 7a-32a).[3]

ARGUMENT

1. In contending (Pet. 13-15) that Revenue Ruling 69-545 misinterprets the "charitable" requirement of Section 501(c)(3) of the Code, petitioners seek a judicial pronouncement requiring a change in the current social policies governing the extent to which hospitals furnish medical care for the indigent. Revenue Ruling 69-545 provides that a nonprofit hospital will qualify for tax-exempt status if it operates a full-time emergency room which is open to all patients, regardless of their ability to pay, and if it accepts all patients who can pay the costs of their regular hospital care either directly or through some form of third-party reimbursement.

The ruling accords with the statutory definition of the term "charitable." As the court of appeals correctly noted (Pet. App. C 20a-25a), it is well established that the term "charitable" may be defined more broadly than merely relief of the poor. Although the Treasury Regulations under the 1939 Code predecessor provision of Sec-

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[3]Although the court of appeals reversed the district court on the merits, it sustained its holding with respect to jurisdiction. The court of appeals concluded that the defenses of standing, sovereign immunity, the Anti-Injunction Act, or the Declaratory Judgment Act were not applicable. It thereby concluded that the district court had jurisdiction to grant the relief requested (Pet. App. C 12a-18a). Because of this jurisidictional holding of the court of appeals, we have filed a conditional cross-petition (No. 74-1124) on behalf of the Secretary of the Treasury. That petition seeks review by this Court only in the event it grants the petition in this case.

tion 501(c)(3) had specified "relief for the poor" as the applicable charitable requirement,[4] the current Regulations,[5] which were adopted after hearing, provide that the term "charitable" must be used in its generally accepted legal sense, which is not limited to its popular sense of benevolence to the poor. *Green* v. *Connally,* 330 F. Supp. 1150, 1159 (D. D.C.), affirmed *per curiam sub nom. Coit* v. *Green,* 404 U.S. 997. Thus, for example, the law of trusts has adopted a broader definition to include the promotion of health as a charitable purpose. See, *e.g.,* Restatement 2d, Trusts, Sec. 368, p. 246 (1959 ed.); IV Scott, *Trusts,* Sec. 368, p. 2853 (3d ed., 1967); *Brattleboro Retreat* v. *Town of Brattleboro,* 106 Vt. 228, 173 Atl. 209; *Evangelical Lutheran Good Samaritan Society* v. *County of Gage,* 181 Neb. 831, 151 N.W. 2d 446; *City of Richmond* v. *Richmond Memorial Hospital,* 202 Va. 86, 94, 116 S.E. 2d 79, 84. See also *Jackson County, Missouri* v. *State Tax Commission,* No. 58676 (Mo. Sup. Ct.), decided March 10, 1975 (*en banc*), holding that a hospital qualified as charitable for state tax purposes even though it had no program for furnishing free non-emergency medical care to indigents.

In light of the foregoing evolution of the term "charitable," the Treasury's modification of its position with respect to the tax-exempt status of hospitals is reasonable. Contrary to petitioners' argument, the Treasury is not required to ignore the general legal definition of "charitable" and employ an interpretation which, in petitioners' view, would result in greater bene-

[4]However, as early as 1924, the Treasury had employed the broader definition of "charitable" which was finally incorporated in the Regulations under the 1954 Code. See Sol. Op. 159, III-1 Cum. Bull. 480; compare S.M. 2160, III-2 Cum. Bull. 151, with I.T. 1800, II-2 Cum. Bull. 152.

[5]See Treasury Regulations, Section 1.501(c)(3)-1(d)(2), issued as T.D. 6391, 24 Fed. Reg. 5217, 5219.

fits to indigent persons. Whatever its prior regulations may have provided, the Treasury is empowered to alter its legal position as set forth in published revenue rulings. See, *e.g., Dixon* v. *United States,* 381 U.S. 68; *Automobile Club* v. *Commissioner,* 353 U.S. 180, 184. Indeed, this case would follow *a fortiori* from the decisions of this Court holding that even Treasury Regulations approved by Congress may be changed pursuant to the broad power of the Secretary under Section 7805 (a) of the Code. See, *e.g., Helvering* v. *Reynolds,* 313 U.S. 428, 432; *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90, 101; *Morrissey* v. *Commissioner,* 296 U.S. 344.[6]

Finally, petitioners contend (Pet. 15-18) that the Treasury's hospital exemption policy must follow other federal policies with respect to health insurance and hospital grant legislation. However, the tax exemption policies established by Congress are designed to encourage a broad pluralism of activities aimed at furthering the public good, as long as the activities meet minimum charitable trust standards[7] and do not contravene any express public policy. By contrast, federal programs involving direct grants, such as for hospital construction, must be subject to far stricter guidelines and controls. Revenue

[6]Apart from the fact that the cases relied upon by petitioners (Pet. 13-14) were decided under the Regulations of the 1939 Code, none of them involved a situation comparable to that presented in Revenue Ruling 69-545. In each of those cases, income of the hospitals inured to private individuals and no hospital provided free emergency care to indigents.

[7]Petitioners rely (Pet. 10-11) on cases such as *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, to show that the Treasury improperly ignored the needs of the poor in issuing Revenue Ruling 69-545. But those cases involved statutes which expressly required formal plans or studies by the agency as a prerequisite to action. Although we are advised by the Internal Revenue Service that it undertook extensive studies and consultation with other agencies respecting hospital care for indigents prior to issuing Revenue Ruling 69-545, such formal procedures are not required by the Internal Revenue Code. At all events, the revenue ruling itself indicates that the interests of the poor were considered in establishing the standard requiring emergency care for indigents.

Ruling 56-185, which granted tax-exempt status to a hospital which provided free care for all indigents, set forth one means of benefiting the community; Revenue Ruling 69-545, which granted tax-exempt status to a hospital which furnished emergency care for all and non-emergency care for all with third-party reimbursement, recognized another type of community benefit program. There may well be other hospital programs which would satisfy the charitable trust standard. Under the present Section 501(c)(3) provisions, such variant approaches to community benefit are equally sufficient to meet what must be an essentially flexible statutory standard.

2. Petitioners further argue (Pet. 8-10) that Revenue Ruling 69-545 is invalid because the Treasury did not promulgate it in accordance with the notice and hearing requirements of the Administrative Procedure Act (5 U.S.C. 553). But these provisions, as the court of appeals correctly held (Pet. App. C 28a-29a), do not apply to revenue rulings because they come within the exception for interpretative rules in 5 U.S.C. 553. It is well settled that agency rulings that do not bind the affected parties or the courts are considered to be interpretative. See, *e.g., American President Lines, Ltd.* v. *Federal Maritime Commission,* 316 F.2d 419, 422 (C.A. D.C.); *Gibson Wine Co.* v. *Snyder,* 194 F.2d 329, 331-332 (C.A. D.C.); *Stevens Elec. Paste Co.* v. *Environmental Protection Agency,* 461 F.2d 293, 304 (C.A. 7).

Unlike the cases relied upon by petitioners, which involve substantive agency orders with binding legal effect,[8] revenue rulings merely represent the views of the Internal

[8]See, *e.g., National Labor Relations Board* v. *Wyman-Gordon Co.,* 394 U.S. 759; *Lewis-Mota* v. *Secretary of Labor,* 469 F.2d 478 (C.A. 2); *Texaco, Inc.* v. *Federal Power Commission,* 412 F.2d 740 (C.A. 3).

Revenue Service as to the proper interpretation of the statute. As this Court stated in *Dixon* v. *United States, supra,* 381 U.S. at 73, revenue rulings are "merely guidelines for * * * [Internal Revenue Service] personnel." Originally, such rulings were sent by high Treasury officials as "circulars" containing administrative instructions to lower revenue officials.[9] Later, synopses of such rulings were published (see Synopsis of Sundry Treasury Decisions (1869)), and occasionally opinions of the Attorney General on revenue matters were included in such compilations (see T.D. 3570, III-1 Cum. Bull. 85 (1924), considered in *Squire* v. *Capoeman,* 351 U.S. 1, 8-9).[10]

In 1953, the revenue rulings program was reorganized in order to supersede and coordinate the large number of types of instructions and opinions which were then issued or published by diverse offices of the Bureau of Internal Revenue, such as General Counsel's Memoranda (G.C.M.) and Solicitor's Opinions (Sol. Op.). At that time, it was stated that the purpose of the revenue rulings program was to inform subordinate officials of established policies and to make such information available to the public. Rev. Rul. 2, 1953-1 Cum. Bull. 484; Rev. Rul. 212, 1953-2 Cum. Bull. 449. Thus, the courts have consistently held that revenue rulings are merely legal opinions issued by the Commissioner's staff which have no binding force or effect of law and are subject to repeated retroactive revocation or change.

[9]The first such "circular" was sent by Secretary of the Treasury Alexander Hamilton to collectors, and dealt with the proper leakage allowance for purposes of the taxes on distilled spirits and molasses. It is reprinted in *Work and Jurisdiction of the Bureau of Internal Revenue,* G.P.O. (1948), p. 9.

[10]Opinions of the Attorney General which were not given Treasury Decision numbers, but which served the same function as tax rulings, include 39 Ops. A.G. 261-266 (1939); 25 Ops. A.G. 605-607 (1906); 24 Ops. A.G. 1-8 (1902); 1 Ops. A.G. 345-346 (1820); 1 Ops. A.G. 269- 270 (1819).

See, *e.g.*, *Bartels* v. *Birmingham*, 332 U.S. 126, 131-132; *Automobile Club* v. *Commissioner*, *supra*, 353 U.S. at 184; *Sims* v. *United States*, 252 F. 2d 434, 438 (C.A. 4); *United States* v. *Bennett*, 186 F.2d 407, 410 (C.A. 5); *United States* v. *Hall*, 398 F.2d 383, 387 (C.A. 8). They are therefore within the exception in 5 U.S.C. 553 to the notice and hearing requirements for "interpretative rules."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.